

Treaty-based ISDS cases brought under Dutch IIAs: An Overview

An overview study by UNCTAD/DIAE, commissioned by the DG Foreign Economic Relations,
Ministry of Foreign Affairs, the Netherlands

KEY FINDINGS

- By the end of 2013, Dutch investors had initiated a total of 61 known treaty-based cases against foreign governments.
- The great majority of claims (52 claims) were filed under Dutch bilateral investment treaties (BITs), while 9 claims were brought pursuant to the Energy Charter Treaty (ECT), a specific plurilateral treaty for energy-related matters to which the Netherlands is a party.
- The 54 cases initiated by Dutch investors by end of 2012, represent 10 per cent of the global number of known cases and account for one-fifth of all claims filed by investors from the European Union (EU).¹
- Claims by Dutch investors are most often directed against respondent States in Latin America, in the EU and in Asia. Venezuela (13 claims) and the Czech Republic (6 claims) are the most frequent respondents.
- Claims under Dutch BITs are primarily brought by companies (legal persons) but there are also examples of claims by individuals (physical persons).
- Investors bringing cases under Dutch BITs vary and include, among others, major Dutch companies, Dutch claimant companies which are part of major TNCs, or smaller and less known companies.
- In around three quarters of Dutch cases, the ultimate owners of the claimants are not Dutch. In two-thirds of those cases, the relevant foreign-owned group of companies does not appear to engage in substantial business activities in the Netherlands.
- The circumstances surrounding each case are highly individualized, ranging from "classic" scenarios such as direct expropriations and issues related to the countries' economic transition (e.g. privatisations), to more unique issues, such as the alleged driving of an enterprise into bankruptcy.
- Some cases involve public services or other social issues, such as the provision of water, health insurance policy or waste management.

¹ Given the preliminary nature of data for the disputes initiated in 2013, those cases are not included in the statistical analysis.

- Some proceedings are confidential which makes it difficult or impossible to obtain any information about those cases. In a number of cases, investors' and governments' reactions to the outcome of a particular case are unknown.
- Out of 54 cases initiated by Dutch investors by end of 2012, 17 are currently pending, and 37 are concluded.
- Out of the 37 concluded cases, 17 were settled by the disputing parties.
- Out of the 20 remaining cases, 11 were decided in favour of the respondent States (either at the jurisdiction or at the merits stage).
- Out of 12 cases that completed the merits stage, the tribunal found treaty breaches in 8 of them, while in 4 cases no treaty breaches were found.
- For the 8 cases where treaty breaches were found, the respondent was found to have violated the clause on expropriation in 5 cases, followed by the clause on fair and equitable treatment (FET) in 4 cases.
- The amount of damages awarded to investors can be significantly lower than the amount they claim. One of the known settlements suggests that settlements may involve large pay-outs.

INTRODUCTION

This study gives an overview of investor-State dispute settlement (ISDS) cases initiated by Dutch claimants under international investment agreements (IIAs) to which the Netherlands is a party, hereinafter "Dutch cases". Annex 1 contains a full list of known Dutch cases (61 cases), including those initiated during 2013.

Part I of the study provides a statistical analysis of all known Dutch cases initiated by the end of 2012 (54 cases).

The analysis focuses on:

- trends over time in filing disputes;
- the respondent States (including their regional distribution and the level of development (UN and World Bank classifications));
- the ultimate ownership of the investors;
- the arbitral forums resorted to;
- the IIA provisions invoked and breaches found; and
- the outcomes of the cases.

Where global data is available, the study compares the specificities of the Dutch cases to the relevant situation for all cases brought globally. The analysis in Part I is based on UNCTAD's database of ISDS cases.

Part II of the study provides a more detailed review of 21 selected Dutch cases. Information on these cases is presented in table format (Annex 2) and accompanied by a short listing of initial findings. For that purpose, research was undertaken by UNCTAD's IIA Team, with a view to complementing the information already contained in UNCTAD's database of ISDS cases. This part of the study does not include an examination of Dutch arbitration cases brought under the Energy Charter Treaty (ECT).

Part III concludes.

PART I. STATISTICAL OVERVIEW²

By end of 2013, Dutch investors had initiated a total of 61 treaty-based international arbitrations against foreign governments ("Dutch cases", see Annex 1).³ These are cases whose existence has become public knowledge. The total number of cases is likely to be higher due to confidentiality reasons.⁴

This part of the study covers arbitrations initiated by end of 2012 (i.e. 54 cases); information for 2013 is too sketchy for statistical analysis.

The 54 known cases are international arbitration claims brought by investors of Dutch nationality (companies or individuals)⁵ pursuant to IIAs. The IIAs concerned include BITs concluded by the Netherlands with other countries (48 cases, i.e. 89 per cent) as well as the ECT (6 cases, i.e. 11 per cent).⁶

1. Number of cases over time

IIA-based ISDS cases were largely non-existent until the late 1990s and started to grow rapidly from the early 2000s. In this regard, the steep upward trend in Dutch cases is by and large consistent with the global trend.

² For analyses of awards and global trends in ISDS, see UNCTAD's recurrent IIA Issues Notes giving annual updates, entitled "*Recent developments in investor-State dispute settlement (ISDS)*". For the review of 2012 developments, see http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf; for the review of 2013 developments, see <http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=718>.

³ The 6 cases which were initiated in 2013 are: *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain* (ICSID Case No. ARB/13/31); *Isolux v. Spain* (Stockholm Chamber of Commerce); *Charanne and Construction Investments v. Spain* (Stockholm Chamber of Commerce); *Natland Investment Group N.V., Natland Group Limited, G.I.H.G. Limited, and Radiance Energy Holding S.A.R.L. v. The Czech Republic* (UNCITRAL); *U.S. Steel Global Holdings I B.V. (The Netherlands) v. The Slovak Republic* (UNCITRAL); *Spentex Netherlands B.V. v. Republic of Uzbekistan* (ICSID Case No. ARB/13/26)

⁴ For example, the Permanent Court of Arbitration (PCA) which administers a large number of ISDS cases brought under UNCITRAL rules, reported that by the end of 2013, the total number of PCA-administered ISDS cases amounted to 99, of which only 23 were non-confidential.

⁵ Where a case is brought by several claimants, at least one of them is of Dutch nationality.

⁶ The ECT is a plurilateral agreement, to which the Netherlands is a party, which includes a chapter with BIT-like provisions and is applicable to investments in the energy sector.

Dutch cases represent about 10 per cent of the global number of known cases (initiated by all other investors in the world) and account for 21.5 per cent of all known cases initiated by EU investors.

Figure 1.1. Dutch cases

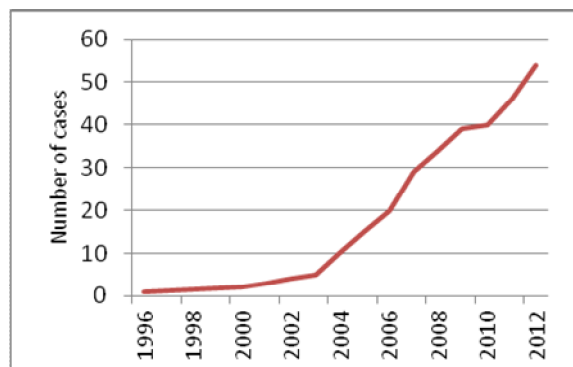
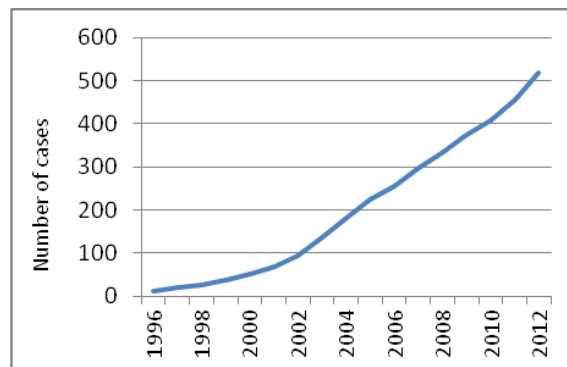


Figure 1.2. All cases (global)



2. Number of cases initiated per year

Starting from 2004, Dutch claimants initiated between five and nine cases per year (with the exception of 2010 when only one case was brought).

The Netherlands ranked second in terms of cases brought by the end of 2012. The United States topped the list, with 125 cases. Other countries with investors active in ISDS include Germany (32 cases), Canada (28), France (27), the United Kingdom (15), and Switzerland (12) (all by end of 2012).

Figure 2.1. Dutch cases

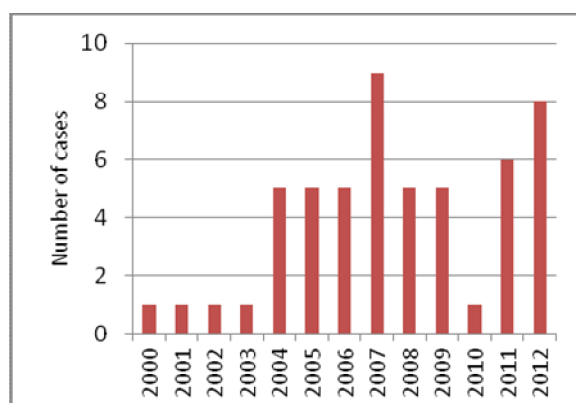
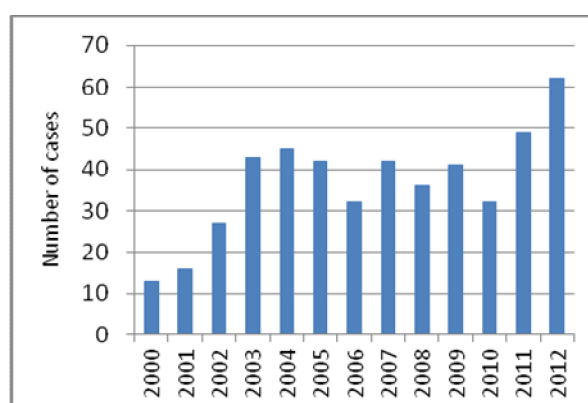


Figure 2.2. All cases (global)



3. Respondent States by geographical region

Dutch claimants initiated most cases against countries in Latin America (35 per cent), in the EU (30 per cent) and in Asia (26 per cent). So far, there have been no cases by Dutch claimants against a North American country.⁷

A comparison to the global figures reveals that Dutch claimants initiate a larger share of cases against other EU Member States.

Figure 3.1. Dutch cases

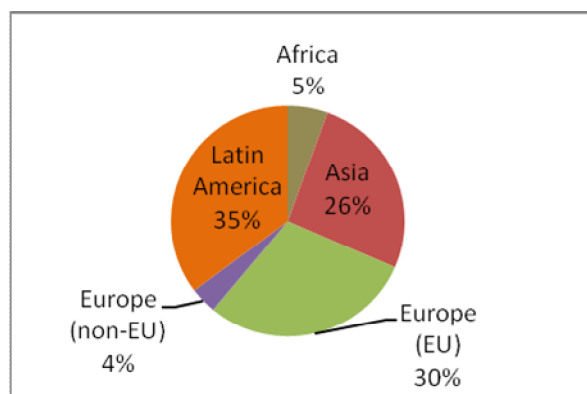
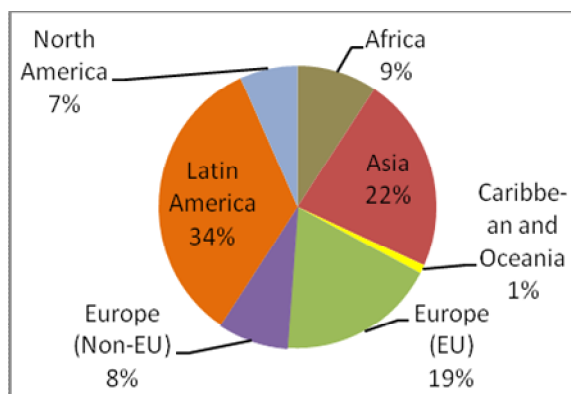


Figure 3.2. All cases (global)



4. Most frequent respondent States

The most frequent respondents in Dutch cases differ from those in the global statistics: only Venezuela and the Czech Republic appear on both lists. For Dutch cases, Venezuela tops the list (13 cases), followed by the Czech Republic (6 cases).

In 2008, Venezuela unilaterally terminated its BIT with the Netherlands. Under the terms of the treaty, the BIT continues to apply to investments made prior to the termination for another 15 years.

Figure 4.1. Dutch cases

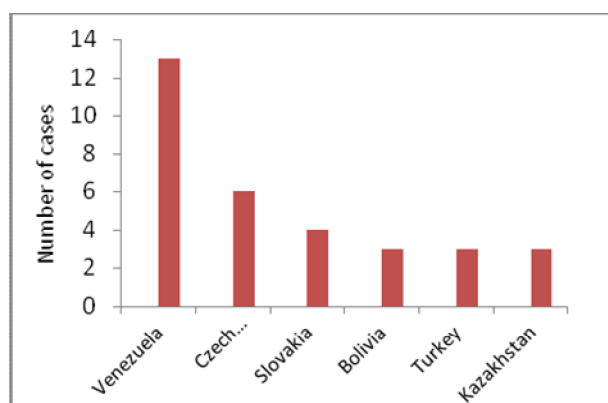
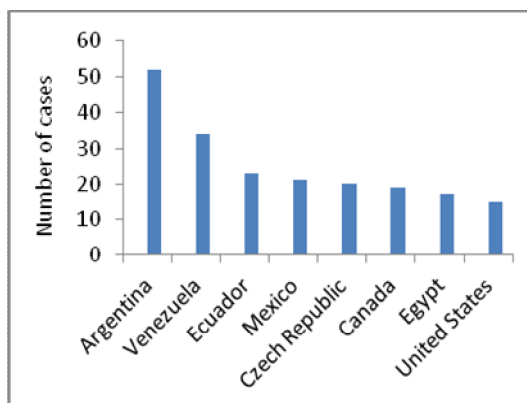


Figure 4.2. All cases (global)



⁷ To date, all known ISDS cases against Canada and the United States have been brought pursuant to the North American Free Trade Agreement (NAFTA).

5. Respondent States by level of development (UN classification)

Approximately three quarters of all Dutch cases were filed against developing countries and transition economies. This largely matches the global picture, albeit Dutch cases display a slightly larger share of cases against developed countries. This is due to a higher amount of cases by Dutch claimants against other EU Member States (see also Figure 3 above).

Figure 5.1. Dutch cases

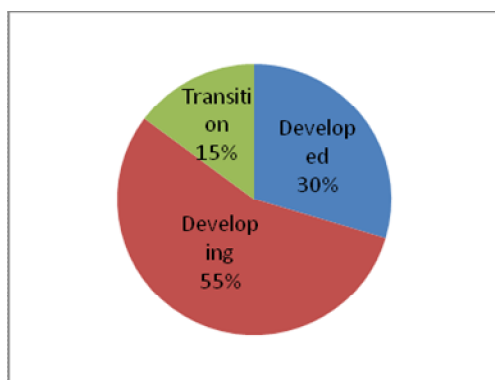
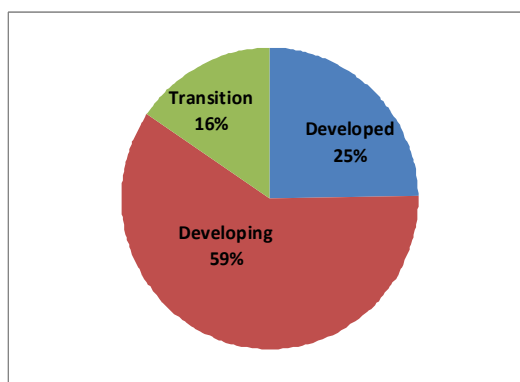


Figure 5.2. All cases (global)⁸



6. Respondent States by level of income (World Bank ranking)

Seventy-five per cent of all Dutch cases have been brought against middle-income countries. Of these, two thirds are against upper-middle-income countries. A quarter of all cases are against high-income economies and only two per cent are against low-income ones. This data roughly corresponds to the global case statistics.

Figure 6.1. Cases by Dutch claimants

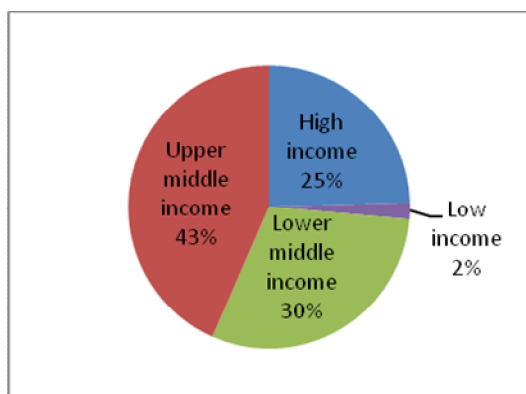
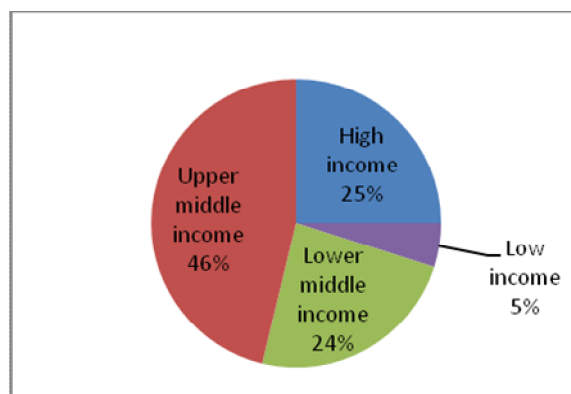


Figure 6.2. All cases (global)

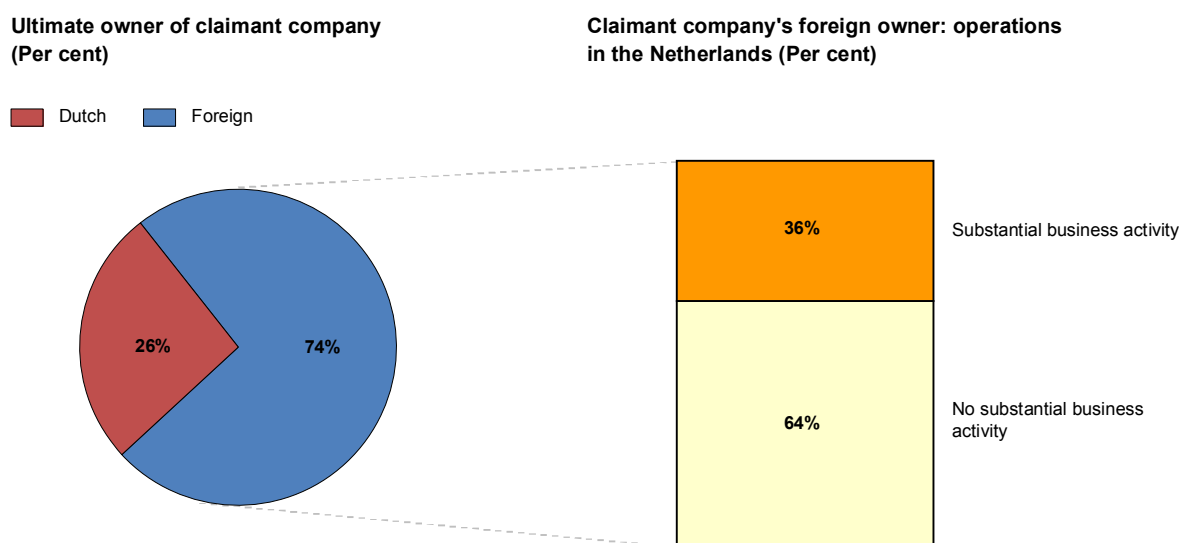


⁸ This data corresponds to data given in UNCTAD's IIA Issues Note No 1, 2013, *"Recent developments in investor-State dispute settlement" (ISDS)*, noting that the IIA Issues Note reports on the total number of respondent States facing cases (per country group/level of development) and not on the total number of cases brought against respondent States (per country group/level of development).

7. Ultimate ownership of Dutch claimant companies

In three quarters of ISDS cases based on Dutch IIAs, the ultimate owners of the claimant companies are not Dutch themselves. None of these foreign-owned but Netherlands-based claimant companies appear to engage in substantial business activities in the Netherlands. Taking Dutch operations of the ultimate foreign owner as a whole (i.e. looking not only at the claimant company but at all Dutch subsidiaries of the given foreign owner), in slightly over one-third of cases the relevant foreign owner has physical presence and appears to carry out business activities in the Netherlands.

Figure 7.1. Ultimate ownership: Dutch cases⁹



Source: Methodology developed and analysis undertaken by UNCTAD in collaboration with the Dutch Ministry for Foreign Affairs. Based on the ORBIS Database by Bureau van Dijk and other publicly available sources.

Notes:

* Two cases, for which it was impossible to identify the ultimate owners of the claimant companies, were assumed to be Dutch.

** For the purposes of this study, a company is considered to have substantial business activity if (1) it has a production facility, research laboratory and/or office in the Netherlands, and (2) employs at least 10 employees. When a company does not meet these requirements it is considered not to have substantial business activity.

8. Economic sectors involved

Almost 60 per cent of all Dutch cases concerned investments in the tertiary (services) sector. Services industries that feature frequently in Dutch cases are financial services (banking, insurance and other), the generation and supply of electricity and telecommunications.

The primary sector (mining, agriculture) and the secondary sector (manufacturing) account for approximately equal shares in the overall distribution of Dutch cases. In the primary

⁹ The information in this chart is based on the analysis of 61 Dutch cases initiated by the end of 2013 (not 54 Dutch cases initiated by the end of 2012, as in the rest of Part I). The four cases, in which claimants were physical persons of Dutch nationality, are not included in the chart.

sector, the oil and gas industry is a clear leader in the number of cases, while manufacturing covers a broad range of activities (beverages, cement, metals, textiles, and other products).

The sectoral distribution of Dutch cases is largely consistent with the global trend of sectoral distribution. Globally, however, cases relating to the services industries take a somewhat smaller share, while cases in the primary industries, particularly in oil and gas and mining, take a somewhat larger share.

Figure 8.1. Dutch cases

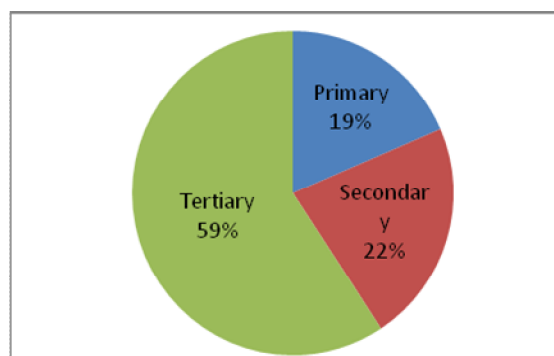
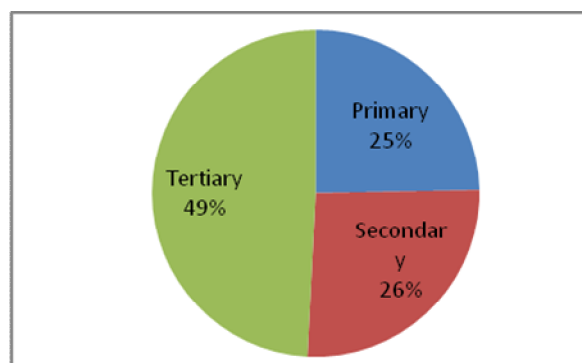


Figure 8.2. All cases (global)



9. Distribution of cases by arbitral rules

In line with global trends, more than two-thirds of known Dutch cases were brought under the ICSID or ICSID Additional Facility rules. Almost all remaining cases were submitted under the UNCITRAL Arbitration Rules (except one case arbitrated under *ad hoc* rules).

Figure 9.1. Cases by Dutch claimants

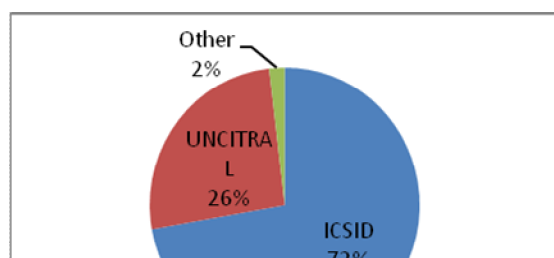
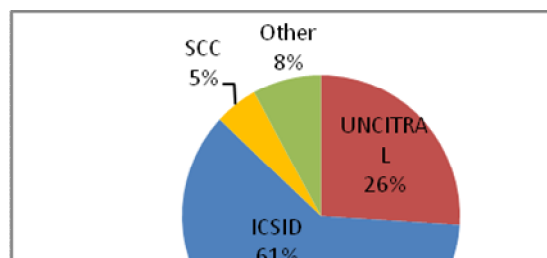


Figure 9.2. All cases (global)



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